84-745

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ALEXANDER L. STEVAS,
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NO._____

_____TERM, 19_____

IN THE SUPREME COURT OF THE UNITED STATES

OF AMERICA

UNITED STATES OF AMERICA,

Respondent

vs.

LOUIS DeMAISE,

Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR

THE THIRD CIRCUIT

ALAN ELLIS, ESQUIRE
ELLIS, FOGELNEST & NEWMAN, P.C.
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Attorney for Petitioner

40pp

QUESTION PRESENTED FOR REVIEW

I. Whether the provisions of the Pennsylvania Wire Tapping Statute, 18 Pa. C.S.A.§5712(b) relating to "minimization" were violated and resulted in a significant deprivation of appellant's constitutional rights to privacy as expressed in Berger v. New York, 388 U.S. 41 (1967).

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OPINION BELOW

The judgment order of the United States Court of Appeals for the Third Circuit is attached to this petition as part of the appendix. That court wrote no other opinion.

JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §1254(1). The judgment order of the United States Court of Appeals for the Third Circuit was rendered on August 27, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth and Fifth Amendments to the United States Constitution and the Pennsylvania Wiretapping Statute, 18 Pa.C.S.A.§5701 et seq. and specifically 5712.

STATEMENT OF THE CASE

In this case, the petitioner, Louis DeMaise, was convicted in the United States District Court for the Eastern District of Pennsylvania, for the crimes of conspiracy, illegal utilization of a communication device and a substantive offense relating to controlled substances. This case was tried without a jury in June, 1984.

The petitioner was sentenced to 10 years in prison, and he perfected an appeal to the United States Court of Appeals for the Third Circuit. Said judgment of sentence was upheld on August 27, 1984, when the United States Court of Appeals for the Third Circuit affirmed the judgment of sentence.

This case involved one of the first Pennsylvania state wire taps under the recently enacted statute permitting the interception, with a Superior Court Order, of telephone conversations in connection with alleged criminal offenses.

Agents of the State Bureau of Narcotics and Dangerous Drugs obtained an interception Order from the Superior Court authorizing electronic interception on the telephone of Linda Peck. Said wire interception continued for a 20 day period and resulted in monitoring for some 24 hours, each day. The target of the wire interception was the boyfriend of Linda Peck, Anthony DeAngelis, who resided with Peck and was apparently involved in receipt and distribution of drugs.

The wire tap disclosed that Anthony DeAngelis was receiving drugs from California and, from time to time, from Bucks County, Pennsylvania as well as the city of Amsterdam. The gist of the charges relating to Appellant Louis DeMaise related to circumstances surrounding the week of October 26, 1982.

From the tapes admitted into evidence on behalf of the Government, it appeared that DeAngelis was out of drugs. Certain taped recorded discussions by and between Appellant DeMaise and DeAngelis seemed to infer that they were either exchanging or intending to exchange something.(1)

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(1) Independent evidence was introduced on behalf of the defendant consisting of testimony of Robert DeMaise, the crippled brother of Louis DeMaise, that for years Appellant Louis DeMaise and DeAngelis had sold, traded and collected coins. In addition to this evidence, coins owned by DeMaise were introduced into evidence and the Government stipulated that DeAngelis had either inherited or somehow acquired a coin collection several years before the transaction herein.

It was also clear from the tapes offered by the Government, coupled with stipulated surveillance testimony, that on the night of October 25, 1982, Appellant Louis DeMaise and Anthony DeAngelis met at a gas station in New Jersey. The evidence clearly demonstrated that Appellant Louis DeMaise's vehicle had broken down and that he had called DeAngelis for assistance.[2]

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(2) There was no question that, indeed, Appellant's vehicle had broken down and was apparently flushed with water by a young boy at the gas station rendering the vehicle inoperable.

Thereafter, the uncontroverted evidence demonstrated that DeAngelis drove Appellant Louis DeMaise back to Appellant's home, remained there for a while and then DeAngelis returned to his own home in Pennsylvania. It was the theory of the Government, based on their tapes and surveillance, that since DeAngelis was in possession of controlled substances sometime early on the next day, October 26, 1982, that the drugs must have originated from Appellant Louis DeMaise because of their nocturnal meeting.[3]

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(3) The crippled brother of Appellant Louis DeMaise, Robert, testified that he was present at Appellant's home when Appellant arrived with DeAngelis but that all conversations concerned coins and he did not observe or hear anything with respect to drugs.

Although the Government was in possession of certain other taped recordings, they chose not to introduce those tapes and transcripts, but they were admitted into evidence on behalf of Appellant Louis DeMaise. Those tapes and transcripts clearly reflected that an individual named Friedman, a financial consultant to DeAngelis, had wired money to someone and that that person was expected in on an airplane the night of the 25th. It was also clear from those defense-offered Government wire taps that the traveler was bringing in "stuff" in bags and that Friedman was going to meet the person, get the "stuff" and divide it up sometime later that night or the next day with DeAngelis.

Despite the taped evidence offered by the defense, the Court found, beyond a reasonable doubt, that Appellant Louis DeMaise had furnished the drugs to

DeAngelis and the Court, in essence, ignored those government taped recordings not offered by the Government, but admitted on behalf of Appellant.

The Court found Appellant guilty, denied post-trial motions, and sentenced Appellant to 10 years in prison.

ARGUMENT

I. WHETHER THE PROVISIONS OF THE PENNSYLVANIA WIRE TAPPING STATUTE, 18 Pa.C.S.A.§5712(b) RELATING TO "MINIMIZATION" WERE VIOLATED AND RESULTED IN A SIGNIFICANT DEPRIVATION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO PRIVACY AS EXPRESSED IN BERGER v. NEW YORK, 377 U.S. 41 (1967).

At the time of the enactment of the Federal Wire Tap Act, 18 U.S.C.§2510, et seq., the federal statute embodied the then existing case law dealing with the restrictions on broad, uncontrolled interception of wire communications. See, e.g., Berger v. New York, 388 U.S. 41 (1967).

There is no doubt that the Pennsylvania Wire Tapping Act must comply both with the Federal Wire Tap Act under 18 U.S.C.§2515 and also with the case law and Constitution of the United States as well as the Pennsylvania Constitution. This issue primarily deals with two separate, but related issues relevant to this case: (a) the constitutionality of the minimization provisions of the Pennsylvania Wire Tapping Act contained in 18 Pa. C.S.A.§5712(b); and (b) the constitutionality of the minimization in the wire tap at issue.

It is contended that the Pennsylvania act is deficient in the following areas as regards to minimization:

1. That the Act is unconstitutionally vague in that it states that the wire tap should "continue for as long as necessary under the circumstances" and that the wire tap terminate as soon as practicable.

2. That minimization be achieved only through a reduction of hours.

3. That the statute is devoid of any language which would require that the wire tap terminate "upon attainment of the authorized objectives."

In essence, the Pennsylvania Wire Tap Statute is deficient in that it does not properly restrict, as does the federal statute, the law enforcement electronic surveillance to exclusively criminal conversations. It does not place sufficient parameters on the suggested conduct of the monitoring agents and permits, as herein, a broad, fishing expedition of electronic surveillance as was condemned by the United States Supreme Court in Berger v. New York, 388 U.S. 41 (1967).

The first failing is based upon the fact that an order under 18 Pa.C.S.A. §5712(d) shall authorize a wiretap for that period of time "necessary under the circumstances" and shall terminate "as soon as practicable." This language is impermissibly vague especially when compared to the Federal Act at 18 U.S.C. §2518(b) which states unequivocally that the wiretap authorization order can not authorize a wiretap for any period longer than is necessary to achieve the objective of the authorization. Clearly, there can be a substantial difference between these two standards. The "attainment of the objective of the authorization" may be met substantially sooner than "as long as it is necessary under the circumstances."

This latter standard is also much more subjective and is much more difficult to review by a supervising Court and lends itself to gross abuse, as herein.

As such, the language in the Pennsylvania Statute does not comport with the language of the Federal Act and under the Supremecy clause of the United States Constitution and §2515 of the Federal Act at Title 18, this provision is deficient and renders that part of the Pennsylvania Wire Tapping Statute null and void.

The next problem is that the Pennsylvania Act discusses minimization in terms of not intercepting conversations otherwise not subject to interception under this chapter by "making reasonable efforts, whenever possible, to reduce the hours of interception authorized by the order."

This is clearly constitutionally deficient in that it omits "intrinsic" minimization and again in failing to instruct that the "tap" terminate upon attainment of the authorized objective.

By way of introduction, two terms should be defined: extrinsic minimization and intrinsic minimization. Extrinsic minimization limits the time period during which monitoring is conducted. Pennsylvania's Act authorizes eavesdropping warrants of up to twenty (20) days duration with a possible extension of an additional twenty (20) days. Another extrinsic minimization practice is the termination of interceptions prior to a warrant's expiration or the restriction of eavesdropping to certain hours each day. Indeed, the minimization provision of

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the Pennsylvania Act §5712(b) requires that every order must contain a provision requiring the applicant to make reasonable efforts whenever possible, to reduce the hours of interception authorized by the Order.

Intrinsic minimization attempt to screen out non-pertinent conversations while they are taking place. This requires monitoring officers to make a reasonable good-faith effort to avoid both listening to and recording non-pertinent conversations. State v. Catania, 85 N.J. 418, 427 A.2d 537 (1981). If, during the first portion of the conversation, the monitor hears a discussion relating to criminal activity, he continues to listen to and record the conversation. If, on the other hand, the conversation appears unrelated to such matters, the monitor deactivates both the listening and recording devices. When the monitor is uncertain whether the conversation relates to criminal activity

or is pertinent, he may spot-monitor the conversation by periodically reactivating the listening and recording devices until he can ascertain whether the subject matter of the conversation has changed. If the conversation becomes pertinent to the investigation, the monitor listens to and records the remainder of the conversation; if not, he deactivates the equipment and continues to spot-monitor or else ceases to monitor the conversation altogether.

It is to be kindly noted that the agent testifying herein clearly evidenced that there was no attempt to minimize by reducing hours in that the Linda Peck telephone was monitored 24 hours a day (N.T. 11/8/82, p. 14); even though there was evidence that relatively little telephone activity occurred between the hours of 12:00 A.M. and 8:00 A.M. (N.T. 11/8/82, p. 23). Further testimony showed that neither the agents involved nor the Attorney General's

Office sought an earlier termination of the tap. (N.T. 11/8/82, p. 83).

In the suppression hearing, the Government has the burden to show, at least prima facially, that it complied with the provision of the Wiretap Statute both under Pennsylvania law, see Pa. R.Crim.P. 323(h) and under Federal Law, United States v. Armocida, 515 F.2d 29, 43, 45 (3rd Cir. 1975).

Courts have stressed that it is the Government's responsibility to present sufficient evidence to guide the inquiry. United States v. Losing, 530 F.2d 1174 (8th Cir. 1976), later appealed 560 F. 2d 906 (8th Cir.), cert. denied, 434 U.S. 969 (1977).

In the present case, the Commonwealth of Pennsylvania did not attempt any extrinsic minimization. In other words, it did not restrict the eavesdropping to certain hours each day. Berger, supra, described 24 hours a day as "such a long and continuous period," 388 U.S. at 59. Moreover, it is contended that the Government did not meet its burden of proof by showing that the Commonwealth agents adequately attempted intrinsic minimization. There will be further discussion of the lack of intrinsic minimization below.

Finally, the Pennsylvania Wiretap Act does not contain language that the wiretap must terminate "upon attainment of the authorized objective." This failing is particularly troublesome in light of the

language included in §2518(5) of the Federal Act and in Berger, supra, which stated the statute therein was deficient for failing to place a "termination date on the eavesdrop once the conversation sought is seized." Id. at 59-60. This is, of course, just another way of stating "upon attainment of the authorized objective." Again, the testimony showed that there was no attempt to terminate the "tap" before the 20 day authorized period which goes to both the failure to minimize intrinsically and extrinsically.

In Commonwealth v. Glover, 397 Pa. 543, 156 A.2d 114 (1959), the Pennsylvania Supreme Court held that penal statutes must be strictly construed and the construction that is to prevail should be a reasonable construction

which operates in favor of life and liberty. Hence, if this Court finds, in strictly construing the statute, that it is constitutional, then it should also construe the statute in a way that comports with the Federal Act and also that both extrinsic and intrinsic minimization should be a requirement.

In conducting the "tap", the Government failed to properly minimize. In order to understand Appellant's position one must look at the objective of the "tap" and the probable cause section.

In the instant case, Judge Cavanaugh's wiretap Order allowed for wire communications to be intercepted involving the distribution and possession of controlled substances and further that "such interception shall begin and terminate as soon as practicable..."

First, it should be noted that this gave the agents involved a chance to intercept conversations concerning any controlled substances where seven months of "buys" from Theodore Geller showed that only heroin was involved. See, generally, Affidavit in Support of Application. Further, under 18 Pa.C.S.A.§5708(4) and 35 Pa.C.S.A.§13(a)(31), any conversation relating to the use, (not a crime) possession, or even distribution of less than 30 grams of marijuana or eight grams of hashish cannot be intercepted.

Finally, a specific durational limit was not placed upon the Commonwealth except that interceptions could only take place for 20 days. Where a Court cannot impose either specific particularization or durational limits, minimization becomes simultaneously more necessary and more difficult.

United States v. Baynes, 400 F. Supp. 285, 310 (E.D. Pa.), aff'd mem., 517 F.2d 1339 (3rd Cir. 1975). In minimizing, the agents involved must minimize listening of non-pertinent calls to the maximum extent possible. In this case, as came out in the suppression hearing, the testifying agent who managed the electronic surveillance openly admitted that the written instructions of the Attorney General's Office, in connection with this wiretap, directed them to electronically surveil all conversations between those persons deemed to be co-conspirators whether pertinent or non-pertinent (criminal or non-criminal). It is respectfully submitted this is a gross violation of the minimization concept and files directly in the face of the federal as well as state standard.

In minimizing, the agents must minimize listening of non-pertinent calls to the maximum extent possible. United States v. Clerkley, 556 F.2d 709, 716 (4th Cir. 1977). Minimization, as mentioned earlier, was one of the constitutional requirements enunciated in Berger, supra, in order to limit the possibility of a general, exploratory search. Minimization is defined as either extrinsic or intrinsic.

As stated earlier, the extrinsic minimization involves duration and the record is devoid of any evidence that the Commonwealth agents attempted to limit the hours of interception. As regards intrinsic minimization, monitors must attempt to minimize non-pertinent telephone calls. Armocida, supra.

In an inquiry into intrinsic minimization, the government has the burden of proving:

> "...that its conduct avoided unnecessary intrusion and returned in...no greater invasion of privacy ...than necessary under the circumstances." Armocida, supra, at 43

At the hearings in the United States District Court on November 8, 1982, there was evidence presented that numerous calls, which should have been minimized, were clearly not. The agent obviously did not seek to minimize the conversations because he felt, pursuant to the improper directive of the Attorney General of Pennsylvania, that non-criminal/non-pertinent discussions should and must be monitored if between persons deemed to be co-conspirators. As an example of many of the calls that were not minimized, the following is found within the record:

1. A call from defendant Newell on October 8 regarding merely a pipe. (Log No. 14, Tape T1);

2. A call on October 8 again regarding a pipe (Lot No. 15, Tape T1);

3. An incoming call on October 8 regarding a shot glass. (Log No. 16, Tape T1);

4. An incoming call on October 8 where a request was made to bring cigarettes. (Log No. 19, Tape T1);

5. Incoming call on October 8 regarding keys. (Log No. 31, Tape T1);

6. Incoming call of October 9 regarding a motorcycle. (Log No. 27, Tape T2);

7. Conversation between Josephine and Samantha DeMaise stating when Josephine will be home. (Log. No. 33, Tape T2);

8. Call from Sava Greenberg to Robert Lipkin on October 9. (Log No. 34, Tape T2);

9. October 10 call from Peck to Pam Goldstein regarding dinner. (Log 11, Tape T3);

10. Incoming call between Louis and Josephine DeMaise, husband and wife (Lot 11, Tape T5);

11. October 13 outgoing call from Peck to Pam Goldstein regarding a social visit. (Log 20, Tape T6);

12. Outgoing call on October 14, 1981 about a car. (Log No. 48, Tape T7);

13. Incoming call about dinner between Peck and Barbara Sonson on October 14. (Log No. 54, Tape T7);

14. Betty Del called and wanted to stay at her borther Anthony DeAngelis' home. (Log 56, Tape T7);

15. Outgoing call from Peck to Jenny DeLap regarding shopping on October 14. (Log 57, Tape 7);

16. Outgoing call from Peck to Sonson regarding a social visit on October 15. (Log 10, Tape T8);

17. Social conversation on October 15. (Log 24, Tape T8);

18. Conversation of Peck and Bethlehem Township Municipal Court regarding a traffic ticket on October 16. (Log 15, Tape T9);

19. Calls regarding a lost dog on October 16. (Log No. 25-7, Tape T9);

20. Call regarding DeAngelis unlocking his barn on October 16. (Log 29, Tape T9);

21. Linda Peck on October 19 calling about buying straw. (Log 19, Tape T12);

22. Peck to DeLap talked for a few minutes about shopping and her horse before minimization. (Log 25, Tape T12);

23. Call on October 19 between Josephine and Samantha DeMaise. (Log 26, Tape T12);

24. DeLap to Peck October 20 general conversation not minimized (Log 10, Tape T13); and

25. Peck to DeLap on October 20. (Log 13, Tape T13).

The list above is quite extensive and shows that many of the calls intercepted were of a personal-social nature rather than involving drugs. The agents knew this from the inception and the calls actually transcribed by the officers show a clear awareness of same. Furthermore, the initial calls of defendants Samuels, Newell, Goldstein and the DeMaises, as well as William David Friedman, involved personal use and possession and of innocent social conversation. Said involvement clearly did not show any pattern of distribution of drugs.

Therefore, on the grounds that either the Pennsylvania Wiretap Statute is unconstitutional, or that the wiretap was performed in an unconstitutional manner, the telephone conversations intercepted in the instant wiretap should be suppressed.

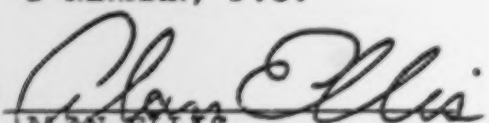
It is to be kindly noted that if this Honorable Court determines that the statute of the Commonwealth of Pennsylvania comports with the federal requirement

relating to "minimization" it is to be respectfully noted that the directive of the Attorney General of Pennsylvania wherein they ordered the monitoring agents to record "all conversations, pertinent or non-pertinent to criminal activity as long as they are deemed to be by and between alleged co-conspirators" constitutes a clear violation of the minimization standard. Indeed, the agents carefully followed that directive and monitored many conversations between alleged co-conspirators having nothing, within their content, relating directly or indirectly to criminal activity.

CONCLUSION

WHEREFORE, for all of the above cited reasons and circumstances, Petitioner, Louis DeMaise, respectfully requests this Honorable Court grant his petition for wirt of certiorari, and issue a briefing schedule in accordance with the business of the court.

Respectfully submitted,
ELLIS, FOGELNEST
& NEWMAN, P.C.

BY: 
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APPENDIX

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States Court of Appeals for
the Third Circuit.....App. 2

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1621

UNITED STATES OF AMERICA

v.

LOUIS DeMAISE,

Appellant

(Criminal No. 82-00224-03 - E.D.Pa.)
District Judge: Honorable L. Mac Troutman

Argued June 12, 1984

ORE: SEITZ, ADAMS, Circuit Judges, and LATCHUM, District Judge*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, vit, that (1) the provisions of the Pennsylvania wire tapping tute, 18 Pa. C.S. §5712(b) relating to "minimization" were violated resulted in a significant deprivation of appellant's titutional rights to privacy as expressed in Berger v. New York, U.S. 41 (1967) and (2) the evidence was insufficient as a matter law to convict appellant of either conspiracy or the substantive enses charged, it is

ADJUDGED AND ORDERED that the judgment of the district court be is hereby affirmed.

By the Court,

Circuit Judge

ATTEST:

Chief Deputy Clerk

D: August 27, 1984

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oracle James L. Latchum, United States District Court for the trict of Delaware, sitting by designation.

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CERTIFICATE OF SERVICE

ALAN ELLIS, ESQUIRE, a member of the Bar of the Supreme Court of the United States, hereby certifies that a copy of the foregoing Writ of Certiorari was mailed to the persons listed below on the 6th day of November, 1984:

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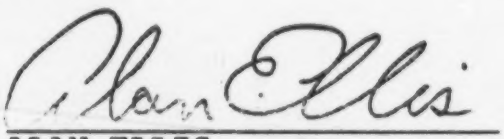
UNITED STATES ATTORNEY
UNITED STATES ATTORNEY'S OFFICE
3310 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106

REX LEE, ESQUIRE
SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
ROOM 5614
WASHINGTON, D.C. 20530



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DATED: November 6, 1984.

Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

NO. 84-745

IN THE SUPREME COURT OF THE UNITED STATES

OF AMERICA

UNITED STATES OF AMERICA,

Respondent

vs.

LOUIS DeMAISE,

Petitioner

SUPPLEMENTAL APPENDIX

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ENTERED: _____

IN THE UNITED STATES DISTRICT COURT

FOR EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATED OF AMERICA: Filed August 10,1983

v. : Criminal No. 82-224

THEODORE GELLER, ET AL. :

MEMORANDUM AND ORDER

TROUTMAN, J. August 9, 1983

Defendants Louis and Josephine DeMaise, moving for a new trial and/or judgment of acquittal, assert generally that their convictions are not supported by record evidence, that antagonistic defenses between themselves and co-defendants deprived them of a truly fair trial, that statements made by co-conspirators were improperly admitted against them and that we erred in denying their motions for judgment of acquittal at the close of the government's case.

We will deny these motions for the reasons set forth below. We will also deny defendant Newell's motion to dismiss the indictment because of the purported under-representation of women from the office of grand jury foreperson.[1]

Whether the DeMaises are entitled to a judgment of acquittal pursuant to Fed. R.Crim.P. 29(c) requires reference to the evidence adduced at trial and consideration of whether all the inferences drawn therefrom when viewed in the light most favorable to the government, support the finding of guilt beyond a reasonable doubt. Burks v. United States, 437 U.S. 1, 16 (1978); Glasser v. United States, 315 U.S. 60 (1942), United States v. Joseph,

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[1]Newell's motion was originally filed as a pre-trial matter. He agreed not to press it at that time. We, accordingly, held the motion under advisement pending the outcome of trial.

526 F.Supp. 504, 506 (E.D.Pa. 1981), aff'd, ___F.2d___(3d Cir. 1982). Cf., United States v. Dixon, 658 F.2d 181, 188 (3d Cir. 1981). (This same standard, deferential to the verdict winner, is employed by appellate courts when reviewing the decision to grant a defendant's Rule 29(c) motion).

Motion for a new trial, pursuant to Fed.R.Crim.P. 33, are, on the other hand, broadly committed to our "sound discretion". United States v. Barlow, 693 F.2d 954, 966 (6th Cir. 1982); United States v. Friedland, 660 F.2d 919, 931 (3d Cir. 1981), cert. denied, 455 U.S. 945 (1982); United States v. Iannelli, 528 F.2d 1290, 1292 (3d Cir. 1976). This rule is "especially" true where, as here, the court sat as the factfinder. United States v. Jacobson, 236 F.Supp. 577, 578 (E.D. Pa. 1964).

A review of the record as to Josephine DeMaise demonstrates she was charged in Count I of a fifty-eight count indictment. In that count, it was charged that Josephine DeMaise conspired, along with thirteen others, to distribute heroin in violation of Title 21 U.S.C.§846. The Court found Josephine DeMaise guilty of the charged offense after a bench trial which ended in early June of this year.

The evidence adduced against Josephine DeMaise reveals that defendant Anthony DeAngelis was receiving packages of heroin in the mail from defendant Avrim Weiner. DeAngelis conspired to distribute this heroin through his co-defendants, one of which was Josephine DeMaise. Her involvement in the scheme generally revolved around making appointments for her husband, Louis, who purchased heroin from DeAngelis.

Specifically, the evidence adduced by the government proves that on October 14, 1981, Josephine DeMaise called DeAngelis and was advised in a coded, but understood way, that heroin had just arrived at the DeAngelis household. At that time, she made an appointment for her husband to purchase the drug. (Tape 7, Log 19).

Three days later, on Saturday, October 17, 1981, Josephine DeMaise again called DeAngelis. Inquiring in a knowing manner and on behalf of her husband, she asked whether anything was "happening", i.e., whether an additional package of heroin had arrived. DeAngelis responded in the negative but suggested that she call back on Monday. (Tape 10, Log 17). Josephine DeMaise complied with this instruction and called back on Monday, October 19, 1981. (Tape 12, Log 10).

DeAngelis was not at home; Josephine spoke with DeAngelis' girlfriend, defendant Linda Peck. Josephine then stated that she would call DeAngelis back in half an hour. Half an hour later she called back and again spoke with Peck. (Tape 12, Log 13). Thereafter, Louis DeMaise spoke with DeAngelis who advised that the anticipated heroin-laden package should arrive at four-thirty.

These conversations prove that Josephine DeMaise acted as a knowing and willing participant in the distribution scheme as alleged in the indictment. Most critically, they demonstrate that she had foreknowledge and could anticipate when heroin shipments would arrive from defendant Weiner. Accordingly, we concluded that her motion for judgment of acquittal is properly denied.

Louis DeMaise's involvement in Count I parallels Josephine's. Indeed, much of Josephine's activities with regard to the conspiracy were in aid of Louis' conspiratorial conduct. However, Louis DeMaise's involvement is broader than that of his wife. For example, the evidence established that on October 23, 1981, DeAngelis was suffering from a dwindling heroin supply. (Tape 16, Log 10). On that same day; Louis DeMaise spoke with DeAngelis. Louis DeMaise asked DeAngelis whether he was "still happening", i.e., whether DeAngelis had any heroin to distribute. DeAngelis responded that he was out of heroin and that he, DeAngelis, had called Louis DeMaise "to find out how long it is goint to be". (Tape 16, Log 18).

During this conversation, which also forms the basis of Count 44[2], Louis DeMaise told DeAngelis that he, DeMaise, would be able to meet with DeAngelis on the following Monday, October 26, 1981. During the interim, October 24-25, DeAngelis was virtually out of heroin (Tape 18, Log 3).

The next Monday, October 26, 1981, DeAngelis and Louis DeMaise met at the DeMaise household; Louis DeMaise conveyed heroin to DeAngelis at that time.[3]

The evidence also demonstrates that the DeMaises had planned to make the trip from their Cinnaminson, New Jersey, home to the DeAngelis residence in Boyertown, Pennsylvania, on October 26, 1981. While

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[2]Count 44 generally charged Louis DeMaise with knowingly using a telephone to conspire to distribute heroin. See 21 U.S.C.§843(b).

[3]This transaction forms the basis of Count 46 wherein the grand jury charged Louis DeMaise with distributing heroin to DeAngelis in violation of 21 U.S.C.§841(a)(1).

enroute, however, they experienced car trouble. DeAngelis met them at a gas station and drove them back to their house. The evidence established that after DeAngelis met with Louis DeMaise, he, DeAngelis, once again had heroin for sale.

At trial, the government contended that Louis DeMaise conveyed heroin to DeAngelis on October 26. The transaction occurred while the two men were at the DeMaise household. The government's proofs were largely circumstantial. Specifically, the government argued that DeAngelis had a dwindling heroin supply during the relevant time and sought to obtain heroin from Louis DeMaise. After the pre-arranged meeting between the two men, DeAngelis had heroin for sale. Hence, the prosecution argued that Louis DeMaise sold the drug to DeAngelis.

Defendants, of course, draw contrary inferences from this same evidence. They argued that the DeMaise and DeAngelis families had been long-standing social friends. They also contended that DeAngelis had inherited a gold coin collection and that the subject of all transactions between him and Louis DeMaise, an avid collector of gold coins, was gold coins. Louis DeMaise also pointed to uncontradicted evidence that the original meeting scheduled for October 26, 1981, between himself and DeAngelis was to be at the DeAngelis residence. If the purpose of the meeting was, as argued by the government, to replenish DeAngelis' heroin supply, questions DeMaise, why did DeAngelis balk at driving to New Jersey to meet with Louis DeMaise? (Tape 19, Log 14). Presumably, DeAngelis would have been anxious to drive to New Jersey to procure the heroin. Moreover,

if DeAngelis was out of heroin at that time and generally sold it on a regular basis, why did he state that he desired to stay home and "make some money" on the relevant date? (Tape 19, Log 14).

We do not find these arguments persuasive in light of the overwhelming number of tapes which showed that DeAngelis was low on drugs at the relevant time. Additionally, DeAngelis always made telephone arrangements prior to procuring heroin. The only one he spoke to in that regard was Louis DeMaise.

Finally, the DeMaises argued that if DeAngelis procured heroin on that evening, he purchased it from someone else. Specifically, defendants contend that DeAngelis had sources of heroin in Bucks County, Pennsylvania, and that he stopped there while driving from the DeMaise

house in New Jersey to his own home in Boyertown, Pennsylvania.

This contention is based upon two conversations. (Tape 19-2, Log 40; Tape 20, Log 1). In the first, DeAngelis called his home and spoke to Peck. He reported that he just arrived at the DeMaise household, was going to get a drink and would leave shortly thereafter. In the second tape, DeAngelis calls Louis DeMaise from his, DeAngelis' home, and reports that he "just got home" that that the ride took one hour and fifteen minutes.

Viewing these two tapes, we have DeAngelis saying to Peck that he will leave immediately and, in the second tape, DeAngelis telling DeMaise that the ride took an hour and fifteen minutes and that he just got home. If DeAngelis did indeed leave immediately and if he actually called DeMaise immediately

upon his arrival, the evidence demonstrates that the ride took an hour and forty-five minutes; hence, thirty minutes of his time is apparently unaccounted for. DeMaise points to DeAngelis' heroin sources in Bucks County and to this thirty minute gap of unaccounted for time and argues that DeAngelis actually procured the heroin that evening from someone other than himself. In support of his contention, DeMaise also points to the fact that Weiner generally sold DeAngelis heroin and that DeMaise was a customer of DeAngelis. He contends that a customer such as DeMaise could not become, as a practical matter, a supplier.

However, we think the tapes demonstrate that Louis DeMaise had sufficient contact to periodically supply DeAngelis with heroin.

See e.g., (Tape 16, Log 18). The so-called thirty-minute gap also overlooks a number of realistic considerations. The first is the DeAngelis call to Peck, (Tape 19, Log 40), where he stated that he will leave immediately after having a drink. Presumably, it took him some time to have a drink.

Moreover, Robert DeMaise, brother of defendant Louis, testified that Louis and DeAngelis "spoke about coins" that evening. Therefore, although DeAngelis indicated to Peck that he would leave immediately, he did not. The thirty-minute gap is further eroded by the fact that it assumes that when DeAngelis called DeMaise and reported that he had gotten home safely, (Tape 20, Log 1) that he called immediately upon his return. In all likelihood, he may have taken a minute or two to take off his jacket, use the bathroom, or just relax for a few minutes. Therefore, the thirty-minute gap is further reduced.

Additionally, all of DeAngelis' transactions were preceded by telephone calls. If DeAngelis had prearranged a buy from an alternative source in Bucks County it would likely have appeared on the wiretap. If, on the other hand, he was unable to arrange a buy in Bucks County until he got to the DeMaise household that, of course, would not appear on the wiretap. However, on the wiretap, DeAngelis is heard saying that he is waiting to "hook up tonight." (Tape 19, Log 17). The only person he was then planning to meet that night was Louis DeMaise. He could not have been planning at that time to meet an alternative source which he had not yet contacted.

We accordingly conclude that the convictions of Louis and Josephine DeMaise are properly supported by the evidence.

In seeking a new trial the DeMaises generally assert that they were prejudiced by the "inherently antagonistic" defense presented by co-defendants Andrew Samuels and John Newell. This assertion is apparently premised upon the notion that we erred in denying pretrial motions to sever. We disagree.

The defense strategy of Samuels and Newell was not antagonistic to that of the DeMaises. Generally, all parties at trial agreed that DeAngelis was a heroin distributor. The DeMaises argued that their contracts with DeAngelis were legitimate ones and were based upon longstanding familial friendships and a common interest in gold coins. Newell and Samuels, on the other hand, admitted that they purchased or procured heroin from DeAngelis but claimed that the drug was for their personal use only.

Hence, they argued that they could not be convicted of distribution. In light of the purity of heroin purchased by each of these defendants, and Samuels' activity as a conduit of money from defendant Friedman to DeAngelis, we disagreed and found them guilty. This brief and perhaps simplified, but nevertheless accurate, description of the defenses presented at trial does not admit to any antagonism.

Moreover, although defendants now claim that we should have granted their motions to sever, defendants have not made any "showing" of prejudice. United States v. Dickens, 695 F.2d 765, 779 (3d Cir. 1982). Indeed, it is difficult to imagine that any such showing could be made in light of the fact that the Court sat as trier of fact;

the Court is capable of sorting out conflicting defense strategies. Thus, the DeMaises' unsubstantiated claims of prejudice have little merit.

The DeMaises also complain that we improperly permitted co-conspirator statements to be used against them and that we never specifically "found" that there was sufficient independent evidence to connect them with the conspiracy.

Courts need not, however, make any explicit "finding" that a conspiracy exists and that the defendant was a participant therein. In fact, when a court denied a defendant's Rule 29 motion at trial, it sub silento determines that a fair preponderance of the independent evidence shows that defendant is a conspirator.

United States v. Ammar, No. 81-1745 slip op. at 11 (3d Cir. June 30, 1983), quoting United States v. Trotter, 529 F.2d 806, 811 (3d Cir. 1976).[4]

The government's evidence aliunde of a conspiracy "need not be overwhelming". United States v. Ammar, supra, slip op. at 16.

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[4] In any case we determined by order of May 6, 1983, that the government's pre-trial offer of proof satisfies the "preponderance of the evidence" test articulated in United States v. Trowery, 542 F.2d 623, 626-27 (3d Cir. 1976) (per curiam), cert denied, 429 U.S. 1104 (1977). Trial developments convince us that this ruling was correct.

Indeed, the government carries its burden so long as the proof aliunde supports a finding that the "existence of the contested fact is more probable than its non-existence". United States v. Trotter, 529 F.2d at 812. Here again, the government's evidence must be considered in the light most favorable to the government. United States v. Provenzano, 620 F.2d 985, 999 (3d Cir. 1980).

The evidence adduced at trial showed that both Josephine and Louis DeMaise knew of and participated in a conspiracy to distribute heroin. Both demonstrated knowledge that DeAngelis procured the drug from a distant source and that illicit packages arrived on a semi-regular basis at the DeAngelis household. Not surprisingly, the DeMaises worked as a team; each one facilitating the activities of the other.

We conclude that the independent evidence, tested under the standards announced in United States v. Ammar, supra, sufficiently proves a conspiracy between the DeMaises and others. Hence, it was not error to introduce co-conspiratorial statements.

The final argument made by the DeMaises is that we erred in denying their Rule 29 motion. We understand this as resurrecting the arguments made on behalf of the DeMaises at trial. The most cogent argument made by the DeMaises at that time was that the government had shown multiple, rather than a single, conspiracy. This is impermissible Kotteakos v. United States, 328 U.S. 750 (1946); United States v. Camiel, 689 F. 2d 31 (3d Cir. 1982). We have reviewed the government's evidence as to a single conspiracy under the standards of United States v. DiPasquale, 561 F.Supp. 1338, 1348-52 (E.D.Pa. 1982)

(Ditter, J.), and find that a single, unitary conspiracy was proven. We accordingly deny the DeMaises' post-trial motions.

We now turn briefly to defendant Newell's motion to dismiss the indictment because of alleged improprieties in selecting grand jury forepersons. Newell's specific contention is that females have been systematically under-represented in the position of grand jury foreperson.[5]

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[5] A similar challenge was made in United States v. O'Looney, Cr.No. 81-260 (E.D. Pa.), Judge Hannum, who presided over O'Looney, apparently denied defendant's motion. The basis for the denial, however, does not appear from the record.

Newell's motion to dismiss is supported by the affidavit of Dr. John Lamberth, an associate professor of psychology at Temple University. He swears that women are under-represented as grand jury forepersons in a statistically significant fashion. For example, his calculations reveal that during the relevant time 13.5% of all grand jury forepersons appointed in the Eastern District of Pennsylvania were women. This amounts to an absolute disparity of 40.1% from the percentage of women within the District, and a relative disparity of 74.8%. The probability of these numbers naturally occurring is assertedly less than 1 in 10,000.

Moreover, Dr. Lamberth attests that he has studied small group decisionmaking

since 1972. His particular emphasis has been upon jury decisionmaking and he has studied the decisionmaking process in over 100 mock petit jury deliberations. Finally, Dr. Lamberth states that, within the context of his research, the foreperson is the most influential individual in jury deliberations.

This analysis is interesting but not legally compelling. We are not convinced, as a matter of law, that the office of grand jury foreperson is of constitutional significance. United States v. Mosto, 540 F.Supp. 346, 361 (D. N.J. 1982). Moreover, the Jury Selection and Service Act of 1968, 28 U.S.C.§1861 et seq. does not mandate that grand jury forepersons represent a fair cross-section of the community. United States v. Perez, 672 F.2d 1380, 1385 (11th Cir. 1982). Hence, we deny Newell's motion.

An appropriate order shall issue denying defendants' post-trial motions.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :

v. : CRIMINAL NO. 82-224

THEODORE GELLER, ET AL. :

O R D E R

TROUTMAN, J.

AND NOW, this 9th day of August, 1983, IT IS ORDERED that the post-trial motions of Josephine and Louis DeMaise to dismiss are DENIED.

IT IS FURTHER ORDERED that the motion of John Newell to dismiss for grand jury foreperson selection improprieties is DENIED.

/s/ Troutman

J.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 83-1821

UNITED STATES OF AMERICA

v.

LOUIS DeMAISE,

Appellant

(Criminal No. 82-00224-03 - E.D. Pa.)

District Judge: Honorable E. Mac Troutman

Argued June 12, 1984

BEFORE: SEITZ, ADAMS, Circuit Judges,

and LACHUM, District Judge*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to wit, that (1) the provisions of the Pennsylvania wire tapping statute, 18 Pa.C.S.§5712(b) relating to "minimization" were violated and resulted

in a significant deprivation of appellant's constitutional rights to privacy as expressed in Berger v. New York, 388 US. 41 (1967) and (2) the evidence was insufficient as a matter of law to convict appellant of either conspiracy or the substantive offenses charged, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

/s/ Seitz
Circuit Judge

ATTEST:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

DATED: August 27, 1984

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*Honorable James L. Latchum, United States District Court for the District of Delaware, sitting by designation.

CERTIFICATE OF SERVICE

ALAN ELLIS, ESQUIRE, a member of the Bar of the Supreme Court of the United States, hereby certifies that a copy of the foregoing Supplemental Appendix was mailed to the persons listed below on the 20th day of November, 1984:

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